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No. 30.

In the Supreme Court of the United States

OCTOBER TERM, 1905

C. H. NICHOLS LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
CHARLES FRANSON,
Defendant in Error.

No. 281 30.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NINTH CIRCUIT, WESTERN DISTRICT OF WASHINGTON.

REPLY BRIEF OF DEFENDANT IN ERROR

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The Ivy Press, Second and Cherry, Seattle.

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Defendant in error having filed his printed brief in support of his motion to dismiss the writ of error and upon the merits, plaintiff in error filed its brief in answer, to which brief we submit the following in reply.

ON MOTION TO DISMISS THE WRIT OF ERROR.

Plaintiff in error contends that it is the duty of the court to decide the question of jurisdiction so as to enable either party to obtain a review of such decision. But it is not the court's duty to furnish the record for the appellate court. This case was tried to a jury and occupied two days. (Rec., pp. 6, 7.) The jurisdiction of the court

was one of the issues in the case submitted to the jury by the express instruction of the court. (Rec., pp. 8, 9.) The jury found the issue in favor of defendant in error. No exception was taken to the action of the court in submitting the issue to the jury, nor to the verdict of the jury upon that ground. What the testimony or evidence was before the jury and upon which the jury based its verdict is not shown by any bill of exceptions in this case and before this court. If the evidence before the jury established the citizenship of defendant in error it is sufficient and a defective allegation of citizenship is cured by the evidence.

Sun Print. & Pub. Co. v. Edwards, 194 U. S. 377, 48 L. Ed. 1029.

Plaintiff in error having taken no exception to the action of the court in submitting the issue to the jury, and having failed to preserve the evidence by proper bill of exceptions, the action of the trial court cannot be reviewed.

Bank v. Caldwell, 11 Sup. Ct. 162;
Kearney v. Denn, 82 U. S. 51, 21 L. Ed. 41.

And it is not the duty of the trial court nor of the adverse party to preserve the record by means of a bill of exceptions, but it is the duty of the party claiming the error and seeking the review.

Hanna v. Maas, 122 U. S. 24, 7 Sup. Ct. 1055.

The record before this court recites that, after verdict plaintiff in error moved to dismiss the action for the reason that defendant in error neither by pleading nor *proof* had shown himself to be a citizen or subject of any state (Rec., p. 8), and that the question of the citizenship of defendant in error was submitted to the jury. (Rec., pp. 8, 9.) But the evidence which went to the jury is not before this court for want of a bill of exceptions.

In the case of *Kearney v. Denn, supra*, this court, in passing upon a similar state of facts, says:

"On that day the plaintiffs in error appeared by their counsel and filed a motion in writing to dismiss the case, for the reason that Mary Kearney was at the commencement of the suit and had been ever since a resident and citizen of the District of Columbia and that J. L. Henry and Kate Kearney Henry, his wife, had been during the same period, citizens and residents of the state of Maryland, and that the court had, therefore, no jurisdiction to hear and decide the cause. The court overruled the motion, but upon what ground does not appear. It is noted on the record that the plaintiffs in error 'reserve their exception to the decision of the court.' This is all the record contains touching the motion. For aught that appears to the contrary, the court may have overruled it, because the facts of the residence of the defendants as stated in the motion were not proved, or because it was proved that they resided in a state or states other than Maryland. Error must be shown. It is never presumed. We cannot take cognizance of the exceptions reserved upon the record, any more than we could of an exception noted in like manner to the admission of improper testimony or misdirection by the judge to the jury, in the trial of a cause. In order to bring the facts properly before us a bill of exception, setting forth what was proved and

the decision of the court should have been taken. As the record stands we cannot examine the subject."

There are then no facts before this court upon which the action of the trial court in refusing to dismiss the case can be reviewed unless the recitals in the question certified to this court is to be taken as a sufficient bill of exceptions. Ex parte proceedings cannot be substituted for a bill of exceptions. The fact that the question certified to this court was prepared by plaintiff in error and submitted to the court ex parte without notice to defendant in error is sufficient to prevent the recitals therein from being taken instead of a bill of exceptions. If such recitals are to be taken instead of a bill of exceptions, then the fact that defendant in error had no notice of the signing of the same and no opportunity to propose amendments, is sufficient to strike the same from the record and to prevent this court from considering the alleged error. The fact that no service of the proposed certificate was made upon defendant in error appears in the record from the fact that no notice, proof of service or acceptance of service is shown.

A certificate of questions upon jurisdiction cannot take the place of a bill of exceptions.

Felix v. Schnarnweber, 125 U. S. 54, 8 Sup. Ct. 759.

But if the certificate in the record is to be taken instead of a bill of exceptions, then we move the court to

strike it from the record for the reason that plaintiff in error was given no notice of its signing and certification, and was given no opportunity to propose amendments to the same, and we respectfully ask that this motion be included in our original motion to dismiss the writ of error.

ON THE MERITS.

The contention of plaintiff in error to the effect that the allegation and evidence were insufficient to establish the citizenship of the defendant in error is based upon a wrong construction of the decision of this court in the case of *Stuart v. Easton*, 156 U. S. 46.

Plaintiff in error makes this statement in its brief (p. 6):

"In *Stuart v. Easton*, 156 U. S. 46, an allegation that one of the parties was 'a citizen of London, England,' was held insufficient to confer jurisdiction *for the reason that Great Britain being under a monarchial form of government had only 'subjects' and no 'citizens.'*" (The italics are ours.)

This is a clear misapprehension of this decision. This court has never held, in that case nor in any other case, that there are no citizens under a monarchial form of government. To so hold would be a clear violation of

the ordinary use and understanding of the English language.

Webster's International Dictionary, Citizen;

Vol. II *Johnson's Universal Enc.*, p. 581;

II *Bouvier's Law Dictionary*, p. 551;

Webster's Dictionary, p. 1099.

The opinion in *Stuart v. Easton* is very brief, and is as follows:

"Plaintiff in error is described throughout the record as a 'citizen of London, England,' and the defendants as 'a corporation of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of the plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed at the cost of plaintiff in error, and the cause be remanded to the circuit court with leave to apply for amendments and for further proceedings. *Bingham v. Cabot*, 3 U. S. 3 Dall. 382 (1:646); *Mossman v. Higginson*, 4 U. S. 4 Dall. 12 (1:720); *Capron v. Van Noorden*, 6 U. S. 2 Cranch. 126 (2:229); *Jackson v. Twentyman*, 27 U. S. 2 Pet. 136 (7:374); *Connolly v. Tailor*, 27 U. S. 2 Pet. 556 (7:518); *Brown v. Keen*, 33 U. S. 8 Pet. 115 (8:886); *Robertson v. Cease*, 97 U. S. 646 (24:1056); *Bors v. Preston*, 111 U. S. 252, 263 (28:419, 422); *Denny v. Pironi*, 141 U. S. 121 (35:657); *Horn v. George H. Hammond Co.*, ante., p. 197."

The foregoing is the decision in full, and it nowhere holds that, "Great Britain, being under a monarchial form of government has only subjects and no citizens," as claimed by plaintiff in error. An examination of the cases cited as the basis of the decision explains the same.

Bingham v. Cabot holds that a description of one party as a "resident of Boston" and the other as a "resident of Philadelphia" is insufficient. The other cases cited are to the same effect. Residence is not synonymous with citizenship. *Denny v. Pironi* holds that it is insufficient to describe one party as a resident of California and the other as a citizen of Texas. From the foregoing it appears conclusively that the words "citizen of London, England" are taken by the court in their primary sense as a townsman or a dweller in a city and to mean only a resident of London, England. For if it held that there are no citizens in a monarchy, and for that reason the description was insufficient, why cite all these cases which hold that it is insufficient to describe a party as a resident of a certain place?

But if this opinion is authority for the claim that a foreign citizen must be described as an "alien," then that is no longer necessary, for the statute has been repealed.

Hennessey v. Richardson, 189 U. S. 24, 47 L. Ed. 697.

In the case at bar the allegation of citizenship in the complaint is as follows: "That the plaintiff now is, and for more than one year last past has been a resident of the state of Washington, and a citizen of Sweden." (Rec., p. 1.) If the recitals of the evidence contained in the questions certified to this court are taken to be correct

and as containing all the evidence in the case on that point, then the proof in support of this allegation is as follows: "Q. Your nationality is what? A. Timber man. Q. What country are you from? A. From Sweden. Q. How long have you been in this country? A. Well, I have been in this country since May, 1903. Q. Since May, 1903? A. I came over from Sweden into Minnesota. Q. Were you in Seattle last August? A. Yes, sir." (Rec., p. 8.)

The court will observe, he is not asked what country he came from, but he is asked: "What country *are* you from?" and he answers: "*From* Sweden." That is: He *is* from Sweden,, *belongs* to Sweden. He is asked: "How long have you been in this country?" and he said: "Since May, 1903." That is seventeen months at the time of the commencement of the suit. He had not been here before, for he said he has been here only since May, 1903. This action was commenced Oct. 3d, 1904. (Rec., p. 4.)

Plaintiff in error is a citizen of the state of Wisconsin. Unless defendant in error was also a citizen of Wisconsin, the jurisdiction of the United States attached. From the testimony of defendant in error above quoted it positively appears that he could not be a citizen of Wisconsin for he had been in the United States only seventeen months and he must therefore be an alien, and it is immaterial what foreign country he was a citizen or sub-

ject of. But if he can be held to have been a citizen of the United States, then by virtue of the 14th amendment, he was a citizen of the state of Washington, for he was a resident of this state and had resided here since August preceding.

In *Sun Print. & Pub. Co. v. Edwards, supra,* this court says:

"Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a 'resident of the state of Delaware,' as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, and a negative answer would have been impelled by prior decisions. * * *

"But the whole record, however, may be looked to for the purpose of curing a defective averment of citizenship, where jurisdiction in a federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere in the record, or facts are therein stated, which in legal intendment constitute such allegation that is sufficient. * * *

"In the first place it" (the evidence) "shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium was legally domiciled in Delaware. Next, it demonstrates that he had no intention to abandon such domicile, for he testified under oath as follows: 'One of the reasons I left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware.' Now it is elementary that, to effect a change of one's legal domicile, two things are indispensible: First, residence in a new domicile; and, second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere ab-

sence from a fixed home, however long continued, cannot work the change. * * *

"As Delaware must then be held to be the legal domicile of Edwards at the time he commenced this action, had it appeared that he was a citizen of the United States, it would have resulted, by operation of the 14th amendment, that Edwards was a citizen of the state of Delaware. *Anderson v. Watt*, 138 U. S. 702, 34 L. Ed. 1081, 11 Sup. Ct. Rep. 449. Be this as it may, however, Delaware being the legal residence of Edwards, it was impossible for him to have been a citizen of another state, district or territory, and he must then have been either a citizen of Delaware or a citizen or subject of a foreign state. In either of these contingencies, the circuit court would have had jurisdiction over the controversy. But in the light of the testimony, we are satisfied that the averment in the complaint that Edwards was a resident 'of' the state of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring that plaintiff was a citizen of the state of Delaware. *Jones v. Andrews*, 10 Wall. 331, 19 L. Ed. 936; *United States Exp. Co. v. Kountze*, 8 Wall. 342, 19 L. Ed. 457."

By reason of the foregoing, we earnestly submit, that the allegation in the complaint "that the plaintiff now is and for more than one year last past has been a resident of the state of Washington, and a citizen of Sweden" together with the proof recited that he *is* from Sweden, that he had been in the United States only seventeen months at the time the suit was brought, and that he resides in Washington, and has resided there since August, 1904, conclusively shows that the court had jurisdiction of the controversy; particularly so when no objection was made until after verdict, and we submit that the question

certified to this court, as to whether the motion to dismiss should have been granted, should be answered in the negative. No objection to the jurisdiction was made until after verdict and subdivision (a) and (b) of the question is therefore immaterial.

Paragraph 4931, Ballinger's Code of Washington, reads as follows:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

Respectfully submitted,

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